Supreme Court, U.S.
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No. 1

In The

Supreme Court of the United States

October Term, 1994

THE COUNTY OF BOYD, a local Nebraska political subdivision, and THE BOYD COUNTY LOCAL MONITORING COMMITTEE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

US ECOLOGY, INC.,

Respondent.

Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by:

PATRICIA A. KNAPP, #17718
Counsel of Record for Petitioners
1305 Plum
Lincoln, NE 68502
(402) 475-2242

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Rule 14(a) THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the District of Nebraska and the Eighth Circuit Court of Appeals erred in finding federal jurisdiction over the County's fraud lawsuit against US Ecology.

2. Whether the County's fraud lawsuit against US Ecology is barred by the doctrine of res judicata because of an earlier lawsuit filed by the State of Nebraska seeking judicial review of an administrative decision by the Central Interstate Low-Level Radioactive Waste Commission. *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Commission*, 834 F.Supp. 1205 (D. Neb. 1993), *aff'd*, 26 F.3d 77 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 483 (1994).

Rule 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all parties appear in the caption.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE

Two opinions by the Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, are at issue on this appeal. The first is the unreported Memorandum and Order dated February 26, 1994, overruling the County's Motion to Remand this action to the state court. The Memorandum appears in the Appendix. The second is the reported Memorandum and Order granting US Ecology's Motion for Summary Judgment found at 858 F.Supp. 960 (D. Neb. 1994).

The opinion of the Eighth Circuit Court of Appeals affirming the District Court's ruling is an unpublished opinion set forth as Appendix 1 to this Petition.

JURISDICTION OF THIS COURT

The date of the entry of the Eighth Circuit judgment sought to be reviewed is February 24, 1995. The County has filed its petition for a writ of certiorari within 90 days of that judgment. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

The County filed this action against US Ecology in state court alleging the eight elements of common law fraud. Specifically, the County alleged that representatives of US Ecology told the Boyd County Board of Supervisors in a number of ways on a number of occasions that

an initial expression of interest in a preliminary study would not bind the County to hosting US Ecology's facility.

Relying upon US Ecology's representations, the County Board adopted a resolution expressing interest in a preliminary study. Prior to the time US Ecology designated Boyd County as one of its three finalist sites, the County Board adopted a resolution formally withdrawing its expression of interest and prohibiting construction of US Ecology's facility in Boyd County.

Despite its earlier representations that the initial expression of interest would not be binding and despite the formal action of the County Board withdrawing from consideration, US Ecology designated Boyd County as its preferred site a full year after the withdrawal.

Subsequent events have established that US Ecology's representations to the County Board regarding the nonbinding nature of an initial expression of interest were false. The County Board's actions, taken in reliance upon those misrepresentations, have in fact bound Boyd County to hosting US Ecology's facility.

US Ecology filed a Notice of Removal from the state court; the County filed a Motion to Remand, asserting a lack of subject matter jurisdiction in the federal courts. The District Court overruled the Motion to Remand, finding diversity-of-citizenship jurisdiction pursuant to 28 U.S.C. §§ 1332(a) and 1441(a).

US Ecology then filed a Motion for Summary Judgment asserting the County's fraud lawsuit was barred by the doctrine of res judicata. The prior litigation relied

upon by US Ecology was a petition filed by the State of Nebraska attempting to invoke judicial review of a decision by the Central Interstate Low-Level Radioactive Waste Commission.

The District Court granted US Ecology's Motion for Summary Judgment and the Eighth Circuit Court of Appeals affirmed.

THE ARGUMENT

Prior to the filing of the County's fraud lawsuit against US Ecology, the State of Nebraska filed a petition for judicial review of an administrative decision by the Central Interstate Low-Level Radioactive Waste Commission. *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Commission,* 834 F.Supp. 1205 (D. Neb. 1993); *aff'd,* 26 F.3d 77 (8th Cir. 1994); *cert. denied,* 115 S. Ct. 483 (1994). The State sought review of the agency's decision not to allow siting of a radioactive waste disposal facility in a community without that community's "consent."

The Central Interstate Compact contains a provision like the judicial review provision found in most administrative procedures acts, i.e., any person aggrieved by a final decision of the Commission may file a petition for judicial review in the appropriate federal district court within 60 days of such decision. Article IV(l).

The United States District Court for the District of Nebraska dismissed the State's lawsuit against the Commission, finding that the petition for review had been

filed after the 60-day time period for challenging the agency's decision had passed.

The County subsequently filed its fraud lawsuit against US Ecology. The County alleged the eight elements of fraud enunciated in Nebraska case law:

1. US Ecology made oral and written representations to the County Board;

2. The representations were false;

3. The representations were made fraudulently;

4. When US Ecology made the representations, US Ecology intended that the County Board would rely on them;

5. The County Board did rely on the representations;

6. The County Board's reliance on the representations was reasonable;

7. The representations were a proximate cause of some damage to the County Board; and

8. The nature and extent of that damage.

The County's lawsuit did not seek to stop US Ecology's project; it did not seek injunctive relief. Rather, it implicitly acknowledged that US Ecology's alleged fraud accomplished its intended purpose; Boyd County is bound to host this facility. What the County sought were money damages incurred as a result of the fraudulent misrepresentations that led to its being host to US Ecology's facility.

The County does not claim that the Compact Commission was involved in any way in US Ecology's alleged fraud. In fact, the County makes no claim implicating any Commission action in any way.

Conversely, the factual basis giving rise to the State's challenge of the Commission decision did not encompass US Ecology's alleged misrepresentations to the Boyd County Board of Supervisors. The factual basis for the County's claim arises out of misrepresentations made by US Ecology to the Boyd County Board of Supervisors. The facts at issue in this case occurred in Boyd County. The actors were the Boyd County Board of Supervisors and US Ecology; the Commission played no role. The factual basis for the Commission decision is irrelevant to the County's claim of fraud against US Ecology.

There is no common nucleus of operative facts between the County's fraud lawsuit against US Ecology and the State's lawsuit seeking judicial review of the Commission decision.

There is only the mischaracterization of this lawsuit as one over "community consent." The concept of "community consent" forms no part of the legal basis for the County's claim. The legal basis for the County's claim lies in the eight elements of fraud enunciated in Nebraska case law. The legal basis for the fraud claim asserted by the County is conceptually distinct from that of the claim earlier asserted by the State.

US Ecology has a contract with the Compact Commission to develop a disposal facility. US Ecology does not become the Compact Commission by virtue of this

contractual relationship. The 60-day time limit for seeking judicial review of Commission decisions does not apply to actions by US Ecology.

Despite the difference in the operative facts and despite the difference in the legal bases for the claims and despite the difference in the parties, the United States District Court for the District of Nebraska found that the County's fraud lawsuit against US Ecology was barred by the doctrine of res judicata and the State's earlier petition for review of the Commission decision. The Eighth Circuit Court of Appeals affirmed.

The District Court began its departure from the accepted and usual course of judicial proceedings when it first took jurisdiction over this case. The Court began its Memorandum and Order on the County's Motion to Remand by stating, "Some Nebraskans, including many in Boyd County, oppose the construction of a radioactive waste disposal facility near Butte, Nebraska. This opposition has led to numerous federal lawsuits seeking to stop or otherwise impede construction of the facility. These efforts have been largely unsuccessful. With this background firmly in mind, I turn to this lawsuit."

The Court ignored the fact that the County had not been a party to any of the prior litigation to which it referred. It also ignored the fact that the County did not seek relief that could "stop or otherwise impede construction of the facility." The type of relief sought by the County implicitly assumed the facility would be built.

These were the first facts the Court ignored, but not the last. This was the beginning of a pattern that shows

predisposition on the part of the Court to dismiss this case regardless of the merits of the County's claim.

The Court ignored the accepted and usual course of judicial proceedings throughout by ignoring all common understandings of the rules of evidence and by rulings on the law that were unsupported by any precedent.

For example, the Court concluded its Order on the Motion to Remand by stating:

"While it is, of course, the burden of Defendant to establish that it is entitled to removal, where Plaintiffs make no specific allegations respecting the amount in controversy in their petition, do not directly respond to the allegations contained in the notice of removal, and make no specific claim, by affidavit or through counsel, that the aggregated amount in controversy will not exceed the jurisdictional amount, I think it appropriate to rely upon Defendant's notice of removal and the attendant publicly reported claim of Plaintiffs' representative that this case involves hundreds of millions of dollars."

The Court had earlier acknowledged that Nebraska code-pleading rules prohibit specific allegations regarding the amount in controversy. The County had directly responded to the allegations contained in the notice of removal in paragraph 2 of its Motion to Remand: "The amount in controversy herein does not exceed $50,000 per individual Plaintiff, exclusive of interest and costs, contrary to the allegations of the Defendant, as set forth in its Notice of Removal."

As stated by the Court, the burden was on US Ecology to establish that the amount in controversy exceeded

the jurisdictional amount. The only evidence offered by US Ecology was a newspaper article stating: "Boyd County residents deserve 'hundreds of millions of dollars' in damages for promises broken by a company siting a low-level radioactive waste repository there, a county official said Wednesday. 'Others might think that's too high,' said Loren Sieh of Naper, a member of the Boyd County Local Monitoring Committee. 'But that's how I feel.' "

If allegations of jurisdictional facts are challenged in any appropriate manner, they must be supported by *competent* proof. *McNutt v. General Motors Corp.*, 298 U.S. 178, 179 (1936). The hearsay account of how Mr. Sieh "feels" about what Boyd County residents "deserve" would not be considered competent proof of the amount in controversy in the accepted and usual course of judicial proceedings. It goes without saying that hearsay cannot stand as proof of the truth of the matter asserted.

In addition to the lack of competent evidence to support its finding, the Court also lacked legal precedent. In order to find the requisite amount in controversy to support diversity jurisdiction, the Court had to find that the claims of the individual plaintiffs should be aggregated. The Court did so with nothing more than the statement, "It seems clear to me . . . " The Court cited no legal precedent, and in fact could cite no such precedent. It does not exist.

In its subsequent Order granting US Ecology's Motion for Summary Judgment, the Court repeats almost verbatim its earlier statement: "Some Nebraskans, including many in Boyd County, Nebraska, and the present

governor of the state, oppose construction of the radioactive waste disposal facility near the community of Butte, in Boyd County, Nebraska. This opposition has resulted in numerous federal lawsuits seeking to stop or otherwise impede construction of the facility. These efforts have been largely unsuccessful."

The critical difference between this and the earlier version is the Court's reference to the present governor of the state. The proposed Boyd County facility is a political issue in the State of Nebraska, and the governor's position is well known to anyone following the constant newspaper coverage. But the governor's political opposition to US Ecology's facility has no more bearing on the merits of the County's fraud claim than do the previous lawsuits filed by other parties. It was inappropriate to consider that background in determining the merits of the County's claim of fraud against US Ecology.

Because the parties are clearly different, the District Court's conclusion on res judicata depends on a finding that the County and the State were "closely related" in the earlier litigation. The Court found that the County and the State were "closely related" in the earlier litigation.

The Court's evidentiary support for its conclusion consisted solely of who prepared and signed various pleadings and which positions were taken on behalf of the County.

It is not within the accepted and usual course of judicial proceedings to consider as evidence counsel's litigation strategy, that strategy being outside the Court's realm of knowledge. Had there been any notice that the

Court considered that strategy a factual issue, either in US Ecology's brief or upon inquiry of the Court, an alternative explanation would have emerged.

The Boyd County attorney who signed the initial Petition resigned mid-litigation, so for a time there was no other counsel to prepare and sign pleadings. A decision was made to keep the litigation moving while the County searched for a replacement.

The positions taken by counsel were at all times in the County's best interest. Sometimes a party's best interest converges with that of another. Positioning oneself in ongoing litigation does not in and of itself prove a coordinated litigation strategy.

The truth is there was no coordinated litigation strategy. The fact that the Court could find one demonstrates the danger of straying too far from the evidence presented by the parties. It also demonstrates the danger of approaching a case with a negative predisposition.

The County respectfully asserts that politics and predisposition have interfered with its right to a fair and impartial hearing on the merits of its claim.

The Eighth Circuit Court of Appeals absorbed the District Court's predisposition. It should be noted it did so without the benefit of oral arguments.

The Eighth Circuit began its opinion by stating, "As will be seen, this was just the latest in a series of actions attempting to block the dump." That conclusion is never "seen"; the Eighth Circuit offers no factual basis to support its opening conclusion. In fact, there is nothing in the

record to support it other than the flawed conclusion drawn by the District Court in the first instance.

The Eighth Circuit went on to state, "The County here asserts that US Ecology breached its duty to seek community support for its dump site. It has already been decided that any community consent requirement is rooted not in state law but in a resolution adopted by the Commission."

The County does *not* assert that US Ecology breached its duty to seek community support; the County asserts that US Ecology breached its duty not to make fraudulent representations to the County Board. That duty is not rooted in a resolution adopted by the Commission; it is firmly rooted in state law.

The Eighth Circuit continued, "The instant legal theories of misrepresentation and fraud may well be different from those presented in the *Nelson* litigation. However, this does not mean the cause of action underlying the theories is different. The doctrine of claim preclusion provides that all theories of recovery stemming from one factual situation must be brought at once. . . . "

The County's theory of recovery does *not* stem from the same factual situation as the State's. US Ecology's misrepresentations to the Boyd County Board of Supervisors occurred at a different time in a different place in a different context and led to different practical and legal results than the Commission's resolution.

The Eighth Circuit continued, "In the *Nelson* cases, the County's residents were represented by the state and

the governor of Nebraska; in the present action, they are represented by the County, which seeks identical relief."

The State sought an injunction to stop the process; the County seeks money damages proximately caused by the conclusion of that process. The relief sought is not identical.

The depth of the Eighth Circuit's analysis reflects its deference to the opinion of the District Court. In this situation, that deference sanctions a departure by the lower court from the accepted and usual course of judicial proceedings.

The factual heart of the County's case lies in statements made by the vice president of US Ecology to the Boyd County Board of Supervisors. The legal theory of recovery lies firmly rooted in state tort law.

This case does not belong in the federal courts. The District Court's predisposition to end litigation involving the dump led it away from the accepted and usual course of judicial proceedings and into an improper exercise of federal court jurisdiction.

This case does not involve the same parties or the same claims as the earlier litigation by the State. In order to reach its conclusion on res judicata, the Court had to transform US Ecology into the Commission and the County into the State. Further, the Court had to transform the nature of the County's claim from one rooted in state law to one rooted in federal law.

US Ecology is not entitled to immunity from state tort liability simply because it has a contract with an interstate compact commission. As this Court has noted, the

States jealously guard their sovereign powers and relinquish no more of their powers to interstate commissions than is necessary to accomplish the purpose of the compact. The federal courts do not imply relinquishment of state sovereignty in the accepted and usual course of judicial proceedings.

Nebraska did not agree to relinquish the rights of its political subdivision to seek redress under fundamental principles of state tort law against Commission contractors when it agreed to join the Central Interstate Low-Level Radioactive Waste Compact. The implications of such a ruling for the sovereign interests of all states as they join interstate compacts is dramatic.

The County's fraud lawsuit should be remanded to the state court in which it was filed for resolution of the state tort claim against US Ecology.

Respectfully submitted by:

PATRICIA A. KNAPP, #17718
Counsel of Record for Petitioners
1305 Plum
Lincoln, NE 68502
(402) 475-2242

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2887

THE COUNTY OF BOYD, a Nebraska Political Subdivision; THE BOYD COUNTY LOCAL MONITORING COMMITTEE, on Behalf of Themselves and All Others Similarly Situated,	* * * * * * * *	Appeal from the United States District Court for the District of Nebraska.
Appellants,	*	
v.	*	
US ECOLOGY, INC.,	*	
Appellee.	*	

Submitted: January 11, 1995

Filed: February 24, 1995

Before WOLLMAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and MURPHY, Circuit Judge.

WOLLMAN, Circuit Judge.

The district court[1] granted summary judgment for US Ecology, Inc., holding that appellant's state law fraud

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

claims were barred under the doctrine of *res judicata*. *County of Boyd v. US Ecology, Inc.*, 858 F. Supp. 960 (D. Neb. 1994). We affirm.

I

The County of Boyd, Nebraska, and the Boyd County Local Monitoring Committee (collectively "County") sued appellee US Ecology, Inc. ("US Ecology"), asserting fraud and misrepresentation in the site selection process for a low-level radioactive waste dump that US Ecology seeks to locate in the County. As will be seen, this was just the latest in a series of actions attempting to block the dump.

US Ecology operates under contract with the Central Interstate Low-Level Radioactive Waste Commission ("Commission"). The Commission in its turn was created by the Central Interstate Low-Level Radioactive Waste Compact ("Compact"), a congressionally sanctioned multi-state agreement, to carry out the Compact's charge of establishing a low-level radioactive waste management system for a number of midwestern states including Nebraska.[2]

The site selection process, including the community consent requirement at the heart of this case, was duly adopted by the commission. To simplify a complex story, after the County consented to being considered as dump

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[2] For background on the Compact, see *Concerned Citizens of Nebraska v. U.S. Nuclear Reg. Comm'n*, 970 F.2d 421 (8th Cir. 1992).

site, US Ecology and the Commission ended a long selection process by deciding to locate the dump near the village of Butte in Boyd County. Under the Compact terms, judicial review of any final Commission decision must be sought within 60 days. Compact, art. IV, ¶ (*l*), reprinted in 2A NEB. REV. STAT. app. ¶ (BB) at 962 (1989).

This filing deadline was missed by several years. Consequently, actions against US Ecology and the Commission by the governor and state of Nebraska seeking judicial review of the site selection have been held to be time-barred. *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205 (D. Neb. 1993) (*Nelson I*), *aff'd*, 26 F.3d 77 (8th Cir.) (*Nelson I Appeal*), *cert. denied*, 115 S. Ct. 483 (1994); *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, No. 4:CV93-3367, slip op. (D. Neb. Dec. 3, 1993) (Mem. and Order) (*Nelson II*) (unreported decision holding that Commission proposal to downsize the dump was not a new final site selection decision requiring renewed community consent).

After the district court decision in *Nelson II*, the County brought this action in Nebraska state court. US Ecology removed the case to federal court, and the district court denied the County's motion to remand, which alleged lack of federal question jurisdiction and asserted that the amount in controversy did not exceed $50,000. The district court granted summary judgment for US Ecology, holding that the County's claims were barred as *res judicata* by the *Nelson* judgments. This appeal followed.

II

The County challenges for the first time on appeal the existence of diversity jurisdiction by asserting that US Ecology's principal place of business is Nebraska, not Texas as alleged by US Ecology in its notice of removal to federal court. In support of this assertion, the County provides no more than a copy of a letterhead showing addresses for US Ecology in Nebraska and Kentucky, but not in California, US Ecology's state of incorporation, nor in Texas, alleged in US Ecology's notice of removal to be its principal place of business. We doubt whether a piece of stationery, proffered for the first time in the County's reply brief, constitutes a cognizable challenge to US Ecology's jurisdictional allegations. We need not resolve this question, however, because whatever the diversity situation, this case is within our subject matter jurisdiction because it presents a federal question.[3]

The County here asserts that US Ecology breached its duty to seek community support for its dump site. It has already been decided that any community consent requirement is rooted not in state law but in a resolution adopted by the Commission. *Nelson I*, 834 F. Supp. at 1208. An interstate compact is a creature of federal law. *Id.* at 1210 (citing *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). Therefore, any duty to seek community consent that may have been created by the Commission was adopted pursuant to the laws of the United States and so federal question jurisdiction exists.

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[3] We reject the County's challenge to the district court's finding regarding the amount alleged to be in controversy.

III

The district court granted summary judgment for US Ecology, holding that the County's community consent-based claims were precluded by earlier final judgments. The district court held that 1) the County raised the same cause of action asserted in the earlier cases, and 2) the County, while not actually a party to the earlier actions, was closely enough related to and had sufficient unity of interests with the prior plaintiffs to warrant preclusion.

The earlier decisions at issue held that Nebraska's community consent-based "challenge to the Commission's site selection . . . is barred by the Compact's limitations period." *Nelson I Appeal*, 26 F.3d at 81; *see Nelson II*, No. 4:CV93-3367, slip op. (D. Neb. Dec. 3, 1993).

The County argues that its claim here differs from those asserted in the *Nelson* cases because it asserts state law tort claims. The County argues that in gaining community consent to consider the Boyd County site, US Ecology made negligent and fraudulent misrepresentations that were relied upon by the County, whereas the *Nelson* cases "litigated whether [US Ecology] had [actually] obtained the requisite community consent as required by" the Commission and the state of Nebraska." County of Boyd Br. at 7.

The instant legal theories of misrepresentation and fraud may well be different from those presented in the *Nelson* litigation. However, this does not mean the cause of action underlying the theories is different. The doctrine of claim preclusion provides that all theories of recovery stemming from one factual situation must be brought at once, or are forfeited; the law will not tolerate

successive suits by a plaintiff stemming from the same scenario. *Ruple v. City of Vermillion*, 714 F.2d 860, 861 (8th Cir. 1983) ("There is no reason to give a claimant more than one fair chance to present the substance of his or her case."), *cert. denied*, 465 U.S. 1029 (1984); *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982). If the facts needed to prove the later case are the same as those needed to prove the earlier case, claim preclusion applies. *Murphy v. Jones*, 877 F.2d 682, 685 (8th Cir. 1989). That is the case here.

Of course, the general common law rule is that claim preclusion only works against those who had a fair chance to contest the earlier suit. *Gerrard v. Larsen*, 517 F.2d 1127, 1133 (8th Cir. 1975). This rule has in recent decades been liberalized, and the focus of the claim preclusion inquiry has in some instances shifted from whether a party itself participated in the prior litigation to whether the party's interests were fully represented in the earlier case, albeit by another. *Headley v. Bacon*, 828 F.2d 1272, 1277 (8th Cir. 1987); *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 827 (8th Cir. 1989). Here, the district court, in its comprehensive, thorough opinion, held that the interests of the plaintiffs in the *Nelson* cases and the County herein were nearly identical. *County of Boyd*, 858 F.Supp. at 971-73.

No other conclusion is possible. In the *Nelson* cases, the County's residents were represented by the state and the governor of Nebraska; in the present action, they are represented by the County, which seeks identical relief. If this action were not precluded, and were the County to fail on the merits as the state of Nebraska did in the *Nelson* cases, a suit could well follow by the village of Butte, representing its residents, which if unsuccessful

might well be followed by a class action on behalf of local residents. Preclusion bars such successive litigation.

The *Nelson* causes of action, like the County's, hinged on proof whether the federally created community consent requirements were fairly met. Proof of one claim would prove the other; thus, for preclusion purposes, the claims are the same. Likewise, as explained above, the plaintiffs in the *Nelson* cases are for preclusion purposes the same as those represented by the County here.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE COUNTY OF BOYD, a Nebraska Political subdivision, and THE BOYD COUNTY LOCAL MONITORING COMMITTEE, in behalf of themselves and all others similarly situated,	)	4:CV93-3435
Plaintiffs,	)	MEMORANDUM AND ORDER
vs.	)	(Filed Feb. 28, 1994)
US ECOLOGY, INC.,	)	
Defendant.	)	

I have been presented with Plaintiffs' Motion to Remand (Filing 4). Finding that this court has diversity-of-citizenship jurisdiction pursuant to 28 U.S.C. §§ 1332(a) and 1441(a), I shall deny the motion for remand.[1]

I.

This court has more than passing familiarity with the controversy in this case. **See State ex rel. Nelson v. Central, Interstate Low-Level Radioactive Waste Comm'n & US Ecology, Inc.,** 834 F. Supp. 1205 (D. Neb. 1993). Some Nebraskans, including many in Boyd County, oppose the construction of a radioactive waste disposal facility near

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[1] As a consequence, I need not and do not determine whether the court also has so-called federal-question jurisdiction.

Butte, Nebraska. This opposition has led to numerous federal lawsuits seeking to stop or otherwise impede construction of the facility. These efforts have been largely unsuccessful. With this background firmly in mind, I turn to this lawsuit.

Plaintiffs, a county government and a local monitoring committee created by state statute, neither of which is a state entity for purposes of diversity jurisdiction, have sued US Ecology, Inc. (US Ecology), a California corporation. There is complete diversity of citizenship between Plaintiffs and Defendant. **See Moor v. County of Alameda,** 411 U.S. 693, 717-22 (1973). US Ecology has removed this action from the district court of Boyd County, Nebraska, and Plaintiffs now seek a remand.

This action is a class action consisting "of all governmental entities in Boyd county and all citizens of Boyd County." (Filing 1, Attach. A ¶ 4.) The action is brought against US Ecology inasmuch as it "has been seeking to site a low-level radioactive waste disposal facility in the State of Nebraska [in Boyd county] for the purpose of selling waste disposal services at said facility." (**Id.,** ¶ 3.) There are two causes of action in this case.

In the first cause of action, it is claimed that: (a) US Ecology "made repeated oral and written representations to the citizens of this State, including the citizens of Boyd County . . . that an initial expression of interest from a county board would not bind a county to hosting" a waste disposal sight; (b) said representations were false in that an initial expression of interest from the Boyd County Board of Supervisors has bound the county to

hosting the site; (c) the representations were made fraudulently with "the intention that the Boyd County Board of Supervisors and the citizens it represents would rely on them"; (d) the citizens of Boyd County is general and the Boyd County Board of Supervisors in particular did in fact rely on the representations; and (e) said conduct caused damage to Boyd County and the citizens it represents including "increased costs of law enforcement, increased costs for emergency response providers, and the costs of a grand jury investigation," together with expenses incurred by the Boyd County local monitoring committee such as "lost income due to the work required and the time involved in fulfilling their statutory obligation. . . . " (**Id.,** ¶¶ 25-31.)

The second cause of action is similar to the first. It alleges that US Ecology "has made repeated oral and written assertions, representations, and statements of fact to the effect that it will not site its facility in a community without that community's consent," that these "representations regarding community consent are inextricably linked to the representations supporting Plaintiffs' First Cause of Action," (**id.,** ¶ 33), but US Ecology "does not intend to honor its 'Commitment to Nebraska' that it will not site its facility in a community without that community's consent." (**Id.,** ¶ 46.) The second cause of action further alleges that US Ecology's representations were "known or reasonably should have been known by the Defendant USE to be untrue, deceptive, or misleading" and that such statements were made for the purpose of selling the proposed facility and its waste disposal services to the public, said communications being disseminated in newspapers, reports, posters, brochures and

letters. (**Id.**, ¶¶ 47-49). As a direct result of that conduct, Plaintiffs claim damages nearly identical to those claimed in the first cause of action. (**Id.**, ¶ 50.) Moreover, Plaintiffs further allege as a result of US Ecology's wrongful conduct that:

> . . . Plaintiffs and the citizens they represent have suffered financial burdens associated with efforts to support grass roots organizations, as well as business and income losses resulting from economic boycotts stimulated by this process. Local social conflicts and interpersonal animosities have become more widespread and rancorous. . . . Community social structures have been negatively affected by the tensions and contentiousness resulting from the proposal. . . . There has been a significant deterioration of the quality of life and social well-being of area residents. The social fabric of Boyd County has been seriously disrupted [and] [a]ll of these social effects could be anticipated by the Defendant USE as a direct and proximate result of its efforts to site a low-level radioactive waste facility in a community without that community's consent.

(**Id.**, ¶ 50.)

The petition concludes with a general prayer for actual damages, damages for pain and suffering, mental distress and social disruption to Boyd County, and punitive damages to be paid to the county and appropriated exclusively to the use and support of the common schools of Boyd County, Nebraska. (**Id.**, at 18.) Consistent with Nebraska code-pleading rules, the petition does not state the amount of damages requested. **See** Neb. Rev. Stat. § 25-804 (Reissue 1989) (stating that petitions claiming

general damages shall not allege a specific amount of money).

II.

Inasmuch as there is complete diversity of citizenship between Plaintiffs and Defendant, the question is whether or not this case satisfies the amount-in-controversy requirement of $50,000, exclusive of interest and costs, set forth in 28 U.S.C. § 1332(a). Plaintiffs assert two arguments for the proposition that this case is not removable for failure to satisfy the amount-in-controversy requirement. I find neither of these arguments persuasive.

A.

First, Plaintiffs argue that since this case is a class action, each plaintiff and the class must satisfy the jurisdictional amount requirement in order for the case to be properly heard in federal court pursuant to the diversity jurisdiction statute. This, of course, is the general rule. **Burns v. Massachusetts Mut. Life Ins. Co.,** 820 F.2d 246, 250 (8th Cir. 1987) (citing **Zahn v. International Paper Co.,** 414 U.S. 291, 294 (1973), and **Snyder v. Harris,** 394 U.S. 332, 336-37 (1969)).[2]

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[2] Because of the manner in which I resolve Plaintiffs' motion, I need not, and do not, determine whether the 1990 legislation regarding supplemental jurisdiction has the effect of overruling **Zahn. See** 28 U.S.C. § 1367. **See also** 7A Charles A. Wright et al., **Federal Practice and Procedure** § 1756, at 3 (1993 supp.).

The general rule has an exception: " ' . . . when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interest collectively equal the jurisdictional amount.' " **Zahn,** 414 U.S. at 294 (quoting **Troy Bank v. G.a. Whitehead & Co.,** 222 U.S. 39, 40-41 (1911)). As a consequence, "[t]he question before us, then, is whether this lawsuit presents a separate and distinct claim as to each member of the proposed class or seeks to enforce a single claim that is undivided and common to the class." **Burns,** 820 F.2d at 250.

I think it clear from the allegations of the petition that the essence of this case is a "single claim that is undivided and common to the class." **Id.** Plaintiffs allege a fraud perpetrated on the entire community of Boyd County, Nebraska, damaging the social fabric of the entire community. Plaintiffs take pains to allege that the fraud was perpetrated on all the citizens of Boyd County. (Filing 1, Attach. A, ¶¶ 25, 27, 28, 33, 48.) Moreover, the alleged damages are essentially communal in nature as well, ranging from "increased costs of law enforcement," (**Id.,** ¶ 31), to disruption of the "social fabric of Boyd County." (**Id.,** ¶ 50.) If there was ever a case where aggregation of the amount in controversy is appropriate, this is just such a case.[3]

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[3] The only conceivable individual claims asserted are those regarding "expenses" incurred by individual members of the monitoring committee. However, these claims are inextricably intertwined with the essential claim of the petition, that is, that US Ecology perpetrated a fraud on the entire community. In any event, this aspect is entirely too insignificant to change the general character of this lawsuit for purposes of determining whether aggregation is appropriate.

B.

Having determined that it is appropriate to aggregate Plaintiffs' interests in order to determine whether there is an amount in controversy sufficient to justify federal jurisdiction, I turn to the question of whether the interests thus aggregated exceed $50,000, exclusive of interest and costs. Plaintiffs argue that Defendant has not established that the interests, as aggregated, exceed the jurisdictional amount.

When state pleading rules prohibit a party from alleging general damages by making a demand for a specific monetary amount, the "federal courts have had some difficulties in measuring the amount in controversy when the complaint is silent or inconclusive. . . . " 14A Charles a. Wright et al., **Federal Practice and Procedure** § 3725, at 423 (1985). Professor Wright and his colleagues suggest that "[w]hen the removal petition or the record before the federal court contains enough information to make a judgment on the matter, the court should do so." **Id.** at 423-24. I shall therefore conduct an independent evaluation of the monetary value of the claim. **Id.** at 423-24 n.19 (collecting cases). **See also** 14A Charles A. Wright et al., **Federal Practice and Procedure** § 3725, at 112 n.19 (1993 supp.) (collecting cases).

Defendant specifically alleges in its notice of removal, (Filing 1 ¶ 5), that a "representative of the Plaintiffs has been reported by the press to have stated that Plaintiffs' claims in this suit are for hundreds of millions of dollars." Defendant attached a copy of the news article upon which it relied. Plaintiffs do not dispute that such a public statement was made by their

representative, although Plaintiffs' counsel suggests in her reply brief that "the damages of a vast majority of the proposed class will be significantly less than $50,000." (Reply Br. Supp. Mot. Remand at 8.) However, Plaintiffs have adduced no evidence to contradict the public assertions of their representative that they are seeking hundreds of millions of dollars, or to prove that they are collectively seeking less than the jurisdictional amount.

While it is, of course, the burden of Defendant to establish that it is entitled to removal, where Plaintiffs make no specific allegations respecting the amount in controversy in their petition, do not directly respond to the allegations contained in the notice of removal, and make no specific claim, by affidavit or through counsel, that the *aggregated* amount in controversy will not exceed the jurisdictional amount, I think it appropriate to rely upon Defendant's notice of removal and the attendant publicly reported claim of Plaintiffs' representative that this case involves hundreds of millions of dollars.[4]

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[4] It should be noted that in **State ex rel. Nelson,** 834 F. Supp. at 1215, the court found that some 33 million dollars had been authorized for expenditure by the Central Interstate Low-Level Radioactive Waste Commission and US Ecology with respect to the Boyd County site. If the proponents of the facility have spent 33 million dollars, such expenditure is surely some evidence that the claims of the facility's opponents, when aggregated, exceed $50,000. It is perfectly appropriate to examine the entire record, including prior federal litigation, in order to determine removability. 14A Charles A. Wright et al., **Federal Practice and Procedure** § 3734, at 543 n.10 (citing, among other cases, **Villerreal v. Brown Express, Inc.,** 529 F.2d 1219 (5th Cir. 1976).

Accordingly,

IT IS ORDERED that Plaintiffs' Motion to Remand (Filing 4) is denied.

DATED this 28th day of February, 1994.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE COUNTY OF BOYD, a Nebraska Political Subdivision, and THE BOYD COUNTY LOCAL MONITORING COMMITTEE, in behalf of themselves and all others similarly situated, Plaintiffs, vs. US ECOLOGY, INC., Defendant.	4:CV93-3435 **MEMORANDUM AND ORDER** (Filed Jul. 21, 1994)

Defendant US Ecology, Inc. (US Ecology) has filed a Motion for Summary Judgment (Filing 12), together with an Index of Evidence Offered in Support of Defendant's Motion for Summary Judgment (Filing 13). The essence of US Ecology's motion is that this case is barred by the doctrine of res judicata. Finding that US Ecology's position is meritorious, I shall grant Defendant's motion for summary judgment in its entirety and enter judgment in favor of Defendant US Ecology and against Plaintiffs, providing that Plaintiffs shall take nothing because application of the doctrine of res judicata bars relitigation of Plaintiffs' claims.

I.

Before turning to the undisputed facts of this case, I note that US Ecology has requested that I take judicial

notice of the pleadings, motions, summary judgment evidence and court orders in *State of Neb. ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Comm'n & US Ecology, Inc.*, (D. Neb.) (No. 4:CV93-3042), granting motion for summary judgment, *reported at* 834 F. Supp. 1205 (D. Neb. 1993), *aff'd*, 1994 WL 250216 (1994) [hereinafter *Nelson I*] and *State of Neb. ex rel. E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Comm'n & US Ecology, Inc.*, (D. Neb.) (No. 4:CV93-3367) [hereinafter *Nelson II*]. Plaintiffs do not object to the court taking judicial notice of the pleadings, motions, summary judgment evidence and court orders in the above-entitled cases. I therefore take judicial notice of the pleadings, motions, summary judgment evidence and court orders in the above-entitled cases pursuant to Federal Rule of Evidence 201(b).

With the foregoing background in mind, I now turn to a discussion of the facts of this case as they relate to US Ecology's motion for summary judgment.

A.

As required by the Local Rules of Practice, US Ecology has set forth a statement of material facts which it believes are uncontroverted. NELR 56.1(a) ("The moving party shall set forth in the brief in support of the motion for summary judgment a separate statement of each material fact as to which the moving party contends there is no genuine issue to be tried and as to each shall identify the specific document or portion thereof or discovery response or deposition testimony (by page and

line) which it is claimed establishes the fact."). US Ecology asserts in section II of its Brief in Support of Motion for Summary Judgment that there is no dispute concerning the following facts:

> 1. On October 8, 1993 the United States District Court for the District of Nebraska rendered the following judgment: *State of Nebraska Ex Rel., E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Commission and US Ecology, Inc.*, No. 4:CV93-3042 (D.Neb. Slip Op. Oct. 8, 1993) ("*Nelson I*"). Def's Ex. 1.
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> 2. On December 3, 1993 the United States District Court for the District of Nebraska rendered the following judgment: *State of Nebraska Ex Rel., E. Benjamin Nelson, Governor v. Central Interstate Low-Level Radioactive Waste Commission and US Ecology, Inc.*, No. 4:CV93-3367 (D.Neb. Slip Op. Dec. 3, 1993) ("*Nelson II*"). Def.'s Ex.2.
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> 3. In *Nelson I* the Court entered a separate judgment providing that Plaintiff would take nothing because the action was barred by the applicable limitations period, and by the equitable doctrines of estoppel and laches. *Nelson II*, Judge Kopf Memorandum dated December 3, 1993 at p.6. [*sic*].[1] Def's Ex. 1.
>
> 4. In *Nelson II* the Court entered a separate judgment providing that Plaintiff would take nothing because the application of the doctrine of res judicata barred relitigation of Plaintiff's claims. *Nelson II*, Judge Kopf Memorandum dated December 3, 1993 at p.13. Def.'s Ex. 2.

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[1] The proper reference is to the separate judgment which was entered in *Nelson I* on October 8, 1993.

5. In *Nelson I* and *Nelson II* the plaintiffs were the Governor of the State of Nebraska, E. Benjamin Nelson, as *parens patriae* on behalf of the State of Nebraska and the Citizens of Boyd County. *Nelson I*, Judge Kopf Memorandum dated October 8, 1993. Def.'s Exs. 1 and 2.

6. In *Nelson I* and *Nelson II* the defendants were US Ecology, Inc. and the Central Interstate Low-Level Radioactive Waste Commission. Def.'s Ex. [*sic*] 1 and 2.

7. The claims raised in the plaintiffs' petition in this action are based on the same factual predicate and arise out of the same nucleus of operative facts, i.e. complaints about site selection as it relates to the principle of community consent, as advanced in *Nelson I* and *Nelson II*. Complaints and summary judgment evidence in *Nelson I* and *Nelson II*.

8. Substantially the same evidence as that offered in *Nelson I* and *Nelson II* governs the issues of fraud and negligence raised in plaintiffs' petition. Summary judgment evidence in *Nelson I* and *Nelson II*.

9. In the present case the plaintiffs, Boyd County, Boyd County Local Monitoring Committee and Citizens of Boyd County, are in privity with the plaintiff, State of Nebraska, ex Rel. E. Benjamin Nelson, Governor, who brought the claims in *Nelson I and Nelson II* as *parens patriae*, on behalf of the State of Nebraska and the citizens of Boyd County. Complaints, summary judgment evidence in *Nelson I* and *Nelson II* and Def.'s Exs. 1 and 2.

(Def.'s Br. Supp. Mot. Summ. J. 3-5.)

Plaintiffs have not complied with the Local Rules of Practice. Specifically, Plaintiffs have failed to comply with NELR 56.1(b), which requires that:

> [any party opposing] a motion for summary judgment shall set forth in its opposing brief a separate statement of each material fact as to which it is contended there exists a genuine issue to be tried and as to each shall identify the specific document or discovery response or deposition testimony (by page and line) which it is claimed establishes the issue. . . .

Plaintiffs failed to provide me with a separate statement of the disputed material facts and failed to give me any citation to an evidentiary predicate for any assertion of a dispute of material fact. It is clear from their brief, however, that Plaintiffs believe: (1) that the doctrine of res judicata does not apply because the claims asserted in this case were not raised, nor could they have been raised, by the State of Nebraska in *Nelson I* or *Nelson II*, and (2) that there is no "privity" between the State of Nebraska in *Nelson I* and *Nelson II* and Plaintiffs in this case.

After carefully considering US Ecology's evidentiary submission and the briefs of all parties, I conclude that the uncontroverted material facts set forth by US Ecology in its brief are the material facts for which there is no factual dispute. Based upon Plaintiffs' brief, I conclude that only two legal questions remain for resolution by this court:

1. Were the claims asserted in this case raised, or could they have been raised, by the State of Nebraska in *Nelson I* or *Nelson II*?

2. Does privity exist between the plaintiff in *Nelson I* and *Nelson II* and Plaintiffs in this case?

B.

Before addressing the legal issues which confront the court, it is appropriate to discuss more fully the prior litigation. It is then helpful to compare the issues raised in the prior litigation with the issues raised in this case.

The effort to locate a regional low-level radioactive waste disposal facility in Nebraska has prompted a good deal of litigation. *See, e.g., Concerned Citizens of Neb. v. United States Nuclear Regulatory Comm'n*, 970 F.2d 421 (8th Cir. 1992) *aff'g in relevant part* the decision of the United States District Court for the District of Nebraska dismissing a complaint by an unincorporated nonprofit citizens' organization and four of its members seeking to stop development of a regional low-level radioactive waste disposal facility.

Some Nebraskans, including many in Boyd County, Nebraska, and the present governor of the state, oppose construction of the radioactive waste disposal facility near the community of Butte, in Boyd County, Nebraska. This opposition has resulted in numerous federal lawsuits seeking to stop or otherwise impede construction of the facility. These efforts have been largely unsuccessful.

(1)

Nebraska's present governor, E. Benjamin Nelson, filed suit in *Nelson I*, asserting the interests of the State of Nebraska and the residents of Boyd County. Governor

Nelson and the State of Nebraska contended that the Central Interstate Low-Level Radioactive Waste Commission (Commission) and its developer, US Ecology, had failed to obtain "community consent," thereby violating a resolution passed and adopted by the Commission and the Low-Level Radioactive Waste Disposal Act adopted by the State of Nebraska to implement the Central Interstate Low-Level Radioactive Waste Compact (Compact). Governor Nelson and the State of Nebraska sought declaratory and injunctive relief.

The Commission and US Ecology argued that the three elements of constitutionally required standing under Article III of the Constitution were not met in *Nelson I. Nelson I,* 834 F. Supp. at 1210. The Commission and US Ecology argued that the State of Nebraska and Governor Nelson lacked standing because they had failed to show: (1) injury in fact, (2) causation, or (3) redressability. *Id.*

I subsequently found that Governor Nelson and the State of Nebraska had *parens patriae*[2] standing to bring this action, holding that:

> . . . However, I believe this is one of the unusual cases where *parens patriae* standing exists. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982).
>
> When the Amended Complaint is viewed in its entirety and given a liberal construction, it is apparent that the State of Nebraska is alleging

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[2] *"Parens patriae"* literally means "parent of the country." *Black's Law Dictionary* 1114 (6th ed. 1990).

> that the residents of Boyd County, Nebraska, and the State of Nebraska, as a member of the Compact, will be forced to accept low-level radioactive waste to the detriment of the health and welfare of residents of Boyd County, Nebraska, and the sovereignty of the State of Nebraska, and that such a threat is real and now present. Accordingly, although *parens patriae* standing is not demonstrated with the clarity I would prefer, I believe the showing which has been made is sufficient, if only minimally so.

Id. at 1210-11.

I then determined that the action brought by Governor Nelson and the State of Nebraska against the Commission and US Ecology in *Nelson I* was time barred because it was not filed within the 60-day period set forth in the Compact for challenging the Commission's final decision and because the equitable doctrines of estoppel and laches also barred the action. Governor Nelson and the State of Nebraska appealed,"and on June 13, 1994, the United States Court of Appeals for the Eighth Circuit affirmed my decision to grant summary judgment in favor of the Commission and US Ecology in *Nelson I*.[3]

(2)

In *Nelson II*, Nebraska Governor E. Benjamin Nelson filed suit against the same parties involved in *Nelson I*. The second suit was virtually identical to the first except

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[3] A petition for rehearing en banc filed by Governor Nelson and the State of Nebraska has not yet been ruled on by the court of appeals.

that the plaintiff attempted to avoid the time bar, and the related application of equitable estoppel and laches, by asserting that the developer proposed to downsize the waste disposal site and that such action constituted another final reviewable decision under the Compact. On December 3, 1993, I granted summary judgment in favor of defendants in this second action on the grounds of res judicata. No appeal was perfected.

(3)

This lawsuit began in state court. It was filed in the district court of Boyd County, Nebraska, on December 21, 1993, less than 20 days after I granted the summary judgment in *Nelson II*. (Filing 1 Ex. A.) On December 30, 1993, US Ecology removed the action to this court, (Filing 1), asserting that this court had both diversity and federal question jurisdiction. On February 28, 1994, I found that this court had diversity-of-citizenship jurisdiction and denied Plaintiffs' motion to remand.[4] (Filing 8.)

This action is not brought by private citizens; rather, it is brought by two public entities. The County of Boyd is a Nebraska political subdivision. *See, e.g.*, Neb. Rev. Stat. §§ 22-108, 23-101 (Reissue 1991). As such, Boyd County has the right to sue and be sued, to plead and be impleaded, and to defend and be defended against in any court having jurisdiction of the subject matter. *Id.* at § 23-101.

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[4] I found it unnecessary to also determine whether this court had federal question jurisdiction.

According to the petition[5] filed in state court, Boyd County, Nebraska, "exercises its powers by and through the Boyd County Board of Supervisors established as a county government under their township organization." (Filing 1 Ex. A ¶ 1.) *See* Neb. Rev. Stat. § 23-201 *et seq.* (Reissue 1991).

The Boyd County Local Monitoring Committee is also an entity created by state law. Neb. Rev. Stat. § 81-15,101.01 (1992 Cum. Supp.). The monitoring committee was authorized pursuant to the Low-Level Radioactive Waste Disposal Act adopted by the State of Nebraska "in furtherance of its responsibility to cooperate and coordinate with the Central Interstate Low-Level Radioactive Waste Compact Commission." Neb. Rev. Stat. § 81-1579 *et seq.* The Boyd County Local Monitoring Committee is comprised of ten members, two from the municipalities which have zoning jurisdiction within 15 miles of the proposed site, or, if there are no such municipalities, from the municipality in closest proximity to the proposed site; two from the county in which the low-level radioactive waste disposal facility is proposed to be located; two from the local natural resources district; and four members, appointed by the governor, representing various interests such as conservation, and agriculture and fire protection. Neb. Rev. Stat. § 81-15,101.01(3); (Filing 1 Ex. A ¶ 2). The purpose of the local monitoring committee was to "represent the citizens of the proposed

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[5] In state pleading practice the pleading which initiates a civil action is called a petition rather than a complaint. Therefore, I use the word "petition" throughout this opinion because that is the style used on the pleading which started this case.

site areas and maintain communication with the developer and the department to assure protection of public health and safety and the protection of the air, land, and water resources of the area." *Id.* at § 81-15,101.01(b).[6]

(4)

Although not certified as such by this court, the action Plaintiffs commenced is nominally a class action consisting "of all governmental entities in Boyd County and all citizens of Boyd County." (Filing 1 Attach. A ¶ 4.) The action is brought against US Ecology inasmuch it "has been seeking to site a low-level radioactive waste disposal facility in the State of Nebraska [in Boyd County] for the purpose of selling waste disposal services. at said facility." (*Id.* ¶ 3.)

Although there are two causes of action, it is obvious that both are predicated upon the same complaint. In fact the petition specifically claims that the actions are "inextricably linked". The petition asserts that: US Ecology "has made repeated oral and written assertions, representations, and statements of fact to the effect that it will not site its facility in a community without that community's consent"; that these representations were not true; and that these "representations regarding community consent are inextricably linked" to the allegations contained in the first and second causes of action. (*Id.* ¶ 33.)

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[6] Although it is far from clear that a local monitoring committee has the capacity to sue or be sued under state law, I have assumed for purposes of this summary judgment motion only that the local monitoring committee in this case has the power to sue.

In the first cause of action, it is claimed that: (a) US Ecology "made repeated oral and written representations to the citizens of this state, including the citizens of Boyd County . . . that an initial expression of interest from a county board would not bind a county to hosting" a waste disposal site; (b) said representations were false in that an initial expression of interest from the Boyd County Board of Supervisors has bound the county to hosting the site; (c) the representations were made fraudulently with "the intention that the Boyd County Board of Supervisors and the citizens it represents would rely on them"; (d) the citizens of Boyd County in general and the Boyd County Board of Supervisors in particular did in fact rely on the representations; and (e) said conduct caused damage to Boyd County and the citizens it represents including "increased costs of law enforcement, increased costs for emergency response providers, and the costs of a grand jury investigation," together with expenses incurred by the Boyd County Local Monitoring Committee such as "lost income due to the work required and the time involved in fulfilling their statutory obligation. . . . " (*Id.* ¶¶ 25-31.)

The second cause of action is similar to the first. It alleges that notwithstanding its representations about "community consent," US Ecology "does not intend to honor its 'Commitment to Nebraska' that it will not site its facility in a community without that community's consent." (*Id.* ¶¶ 33, 46.) The second cause of action also alleges that US Ecology's representations were "known or reasonably should have been known by [US Ecology] to be untrue, deceptive, or misleading," and that such statements were made for the purpose of selling the proposed

facility and its waste-disposal services to the public, said communication being disseminated in newspapers, reports, posters, brochures and letters. (*Id.* ¶¶ 47-49.)

Plaintiffs claim damages as a result of the second cause of action that are nearly identical to those claimed in the first cause of action. (*Id.* ¶¶ 31, 50.) Moreover, Plaintiffs further allege as a result of US Ecology's wrongful conduct that:

> . . . Plaintiffs and the citizens they represent have suffered financial burdens associated with efforts to support grass roots organizations, as well as business and income losses resulting from economic boycotts stimulated by this process. Local social conflicts and interpersonal animosities have become more widespread and rancorous. . . . Community social structures have been negatively affected by the tensions and contentiousness resulting from the proposal. . . . There has been a significant deterioration of the quality of life and social well-being of area residents. The social fabric of Boyd County has been seriously disrupted. . . .

(*Id.* ¶ 50.)

The petition concludes with a general prayer for actual damages, damages for pain and suffering, mental distress and social disruption to Boyd County and punitive damages to be paid to the county and appropriated exclusively to the use and support of the common schools of Boyd County, Nebraska. (*Id.* at 18.)

In summary, the essence of both causes of action is the claim that US Ecology's failed to achieve community consent for the waste disposal facility and such failure

caused diffuse "social fabric" damages. Indeed, in the second-to-last paragraph of the petition, Plaintiffs conclude by stating that "*[all of these social effects* could be anticipated by [US Ecology] as a direct and proximate result of its efforts to site a low-level radioactive waste facility in a community *without that community's consent.*" (*Id.* ¶ 50 (emphasis added).)

II.

The doctrine of res judicata bars claims where one suit follows another if the following elements are met: (1) a prior judgment was rendered by a court of competent jurisdiction; (2) the prior decision was a final judgment on the merits; (3) the same cause of action is involved in all cases; and (4) the same parties or those in privity are involved in all cases. *See, e.g., Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987) (citing *Montana v. United States*, 440 U.S. 147 (1979)); *King v. Hoover Group, Inc.*, 958 F.2d 219, 222 (8th Cir. 1992) (applying the same test under Nebraska law). Res judicata precludes the relitigation of a claim on grounds that were raised, or could have been raised, in the prior action. *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir.), *cert. denied*, 498 U.S. 823 (1990).

Each of the four elements for application of res judicata have been established by US Ecology. I come to this conclusion for the following reasons.

A.

The first question is whether the prior judgments in *Nelson I* and *Nelson II* were rendered by a court of competent jurisdiction. Plaintiffs do not claim that this court lacked jurisdiction to enter judgment in *Nelson I* and *Nelson II*.

I specifically found in Nelson I that the court had so-called "federal question" jurisdiction under 28 U.S.C. § 1331. 834 F. Supp. at 1210 (construction of the provisions of the Central Interstate Low-Level Radioactive Waste Compact adopted by Congress under the Compact Clause of the Constitution provided a federal question). The same jurisdictional predicate existed in *Nelson II*.

US Ecology has therefore satisfied the first element for application of the doctrine of res judicata.

B.

The next issue is whether this court's prior judgments in *Nelson I* and *Nelson II* were final judgments on the merits. Once again, Plaintiffs do not challenge US Ecology on this point.

This court entered separate and specific judgments in *Nelson I* and *Nelson II*. In the first judgment this court concluded that the plaintiff should "take nothing" because the action was "barred by the applicable limitation period and by the equitable doctrines of estoppel and laches." In the second judgment, this court again found that the plaintiff should "take nothing" as "application of the doctrine of res judicata bars relitigation of Plaintiff's claims."

The entry of a separate judgment stating that "all relief shall be denied," or equivalent words, constitutes a final judgment. Fed. R. Civ. P. 58, 79(b); *Ruple v. City of Vermillion*, 714 F.2d 860, 861-62 (8th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984) (for purposes of doctrine of res judicata a summary judgment is just as binding as a judgment entered after trial of the facts).

Moreover, the previous judgments were "on the merits". Indeed, any dismissal "operates as an adjudication upon the merits" unless the court specifies otherwise, or unless the dismissal is based upon a lack of jurisdiction, improper venue, or failure to join a party. Fed. R. Civ. P. 41(b). *See also Myers v. Bull*, 599 F.2d 863, 865 (8th Cir.), *cert. denied*, 444 U.S. 901 (1979) (plaintiff's attempt to resurrect two claims raised in previous complaint was barred by res judicata effect of district court's previous decision that claims were brought outside of the period of the applicable statute of limitations); *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 781 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (disposition of applicant's actions under Title IX of Education Amendments of 1972 and 42 U.S.C. § 1983 on grounds of laches was a judgment on the merits for res judicata purposes).

US Ecology has therefore satisfied the second element for application of the doctrine of res judicata.

C.

The third element of res judicata deals with the question of whether there is sufficient similarity in the causes of action in the prior and subsequent suits to allow application of the doctrine. Plaintiffs contend that the "causes

of action" involved in this case were not asserted in *Nelson I* and *Nelson II*. I disagree because although Plaintiffs have "dressed up" this case differently than the previous litigation, the cases are indistinguishable for res judicata purposes.

At least in this circuit, the phrase "cause of action" no longer has the "rather rigid and technical construction" that it once had at common law. *Ruple*, 714 F.2d at 861. As Chief Judge Arnold has stated, "if a case arises out of the same nucleus of operative facts, or is based upon the same factual predicate, as a former action, [it is now said that] the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Id. See also Lane*, 899 F.2d at 743; *Murphy v. Jones*, 877 F.2d 682, 684 (8th Cir. 1989); *Poe v. John Deere Co.*, 695 F.2d 1103, 1105-06 (8th Cir. 1982).

The phrase "cause of action" is no longer given its technical common-law meaning because the more liberal pleading rules are intended to encourage resolution of related complaints in one case, although those complaints might, under common law precepts, be viewed as technically separate causes of action. *Ruple*, 714 F.2d at 861. Because of this liberality, "there is no reason to give a claimant more than one fair chance to present the substance of his or her case." *Id.*

The issue brought by Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* was whether the Compact Commission and US Ecology had "failed to obtain 'community consent,' thereby violating a resolution passed and adopted by the Commission, and violating the Low-Level Radioactive Waste Disposal Act

adopted by the State of Nebraska to implement the Compact." *Nelson I*, 834 F. Supp. at 1208. The "inextricably linked" first and second and causes of action in this case, (Filing 1 Ex. A ¶ 33), are based upon US Ecology's alleged "efforts to site a low-level radioactive waste facility in a community without that community's consent." (*Id.* ¶ 50.)

Governor Nelson and the State of Nebraska complained in *Nelson I* and *Nelson II* that the Compact Commission and US Ecology had agreed to achieve "community consent" but had failed to do so, thereby violating a Compact resolution and the laws of the State of Nebraska. The same allegation is made in this lawsuit; that is, US Ecology fraudulently or negligently misrepresented that it would achieve community consent but did not do so. This lack of community consent is the "soul" of Plaintiffs' complaint in this case. (Filing 1 Attach. A ¶¶ 5, 10, 23, 33-35, 37-38, 40-41, 43-46, 48-50.)

In summary, no matter how one chooses to style the "causes of action," this case is nonetheless identical to *Nelson I* and *Nelson II* because all three cases are based "upon the same factual predicate" or "the same nucleus of operative facts." *Ruple*, 714 F.2d at 861. That the plaintiff did not seek damages in *Nelson I* and *Nelson II* is not significant. As pointed out later, the plaintiff in *Nelson I* and *Nelson II* could have asserted the same damages which Plaintiffs in this case now assert. Res judicata precludes the relitigation of a claim on grounds that were raised, or could have been raised, in the prior action. *Lane*, 899 F.2d at 741. US Ecology has therefore satisfied the third element for application of the doctrine of res judicata.

D.

A more unusual, but ultimately no more difficult, aspect of this case involves "privity." Boyd County and the Boyd County Local Monitoring Committee are obviously not the same parties as Governor Nelson and the State of Nebraska. Of course, the law does not require that they be the same in order for the doctrine of res judicata to apply so long as the parties are "in privity."

For some time now, "privity," like its common-law counterpart "cause of action," has been understood in nontechnical terms. The older common-law understanding of privity has been dropped for purposes of the application of the modern doctrine of res judicata. As Professor Wright has observed, as the "preclusive effects of judgments have expanded to include nonparties in more and more situations, however, it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper. Modern decisions search directly for circumstances that justify preclusion." 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4449 at 418-19 (1981) (footnotes omitted) (citing, among other cases, *Gerrard v. Larson*, 517 F.2d 1127, 1133-34 (8th Cir. 1975)). Thus, "privity" may exist where the parties in the first action are "so closely related" to the parties in the second action that their interests may be said to be "nearly identical", such that it "is fair to treat them as the same parties for purposes of determining the preclusive effect of the [prior] judgment." *Ruple*, 714 F.2d at 862 (holding that the fact that some of the parties in the subsequent suit were not parties in the prior state-court action did not preclude application of res judicata

because the newly named parties were in privity with those who were named in the state-court action).

Or, as the court in *Headley*, 828 F.2d at 1277, stated, "Our focus is not the nature of the relationship between [the parties] in general, but the identity of their interests in" the first litigation (holding that interests of police officers, in their individual capacity, in civil-rights action were not sufficiently congruent to those of their employer, the city, in prior Title VII action for police officers to be in privity with the city for purposes of the doctrine of res judicata).

To use the language of *Ruple*, I find and conclude that Plaintiffs in this case "are so closely related" to Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* and "their interests so nearly identical" that it "is fair to treat them as the same parties for purposes of determining the preclusive effect" of *Nelson I* and *Nelson II* on the present action. *Ruple*, 714 F.2d at 862. US Ecology has therefore established the fourth element necessary for application of the doctrine of res judicata. I come to this conclusion for the following reasons.

(1)

It is obvious that Governor Nelson and the State of Nebraska are "closely related" to the County of Boyd, Nebraska, and the Boyd County Local Monitoring Committee, Plaintiffs in this case. All the named plaintiffs in *Nelson I*, *Nelson II* and in this case are political bodies, rather than private individuals, with the exception of Governor Nelson, who sued in his official capacity (hence

the designation "ex rel.").[7] The three parties thus share a common political bond – the laws of the State of Nebraska have charged them with representing their constituents.

Moreover, in *Nelson I*, I found that the sovereign interests of the State of Nebraska *and* the interests of Boyd County, Nebraska, were expressly being asserted by Governor Nelson and the State of Nebraska, since it was claimed that "the residents of Boyd County, Nebraska, and the State of Nebraska, as a member of the Compact, will be forced to accept low-level radioactive waste to *the detriment of the health and welfare of residents of Boyd County, Nebraska* and the sovereignty of the State of Nebraska. . . . " *Nelson I*, 834 F. Supp. at 1210 (emphasis added). Thus, Governor Nelson and the State of Nebraska "closely related" themselves to the political-subdivision plaintiffs in this case by asserting the interests of Boyd County, Nebraska, and its citizens.

There is also *evidentiary* support in the record before me that the Plaintiffs in this case, and Governor Nelson and the State of Nebraska, were "closely related". Plaintiffs' lead counsel in this case has been Patricia A. Knapp, who originally signed the petition as counsel for the Boyd County Local Monitoring Committee. (Filing 1 Ex. A at 19.) Since then it has been Ms. Knapp who has taken the laboring oar in prosecuting this case for Plaintiffs.

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[7] The "supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered." Neb. Const. art. IV, § 6, *reprinted in* Vol. 2 Neb. Rev. Stat. (Reissue 1989).

For example, Ms. Knapp signed the motion to remand while the Boyd County attorney did not. (Filing 4.) Ms. Knapp also signed the Form 35 Report of Parties' Planning Meeting regarding discovery, while the Boyd County attorney did not. (Filing 9.) Indeed, Ms. Knapp signed Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment, while the Boyd County attorney did not.

On October 4, 1993, Ms. Knapp filed a motion for leave to appear as amicus curiae in *Nelson I*. (Filing 40 in *Nelson I*.) In that motion Ms. Knapp sought to acquaint me with a variety of facts, including presenting me with transcripts of hearings before a state-court judge. (*Id.* ¶ 7.) Attached to Ms. Knapp's motion were various exhibits she wanted me to consider. (*Id.* Exs. 1, 2.) Ms. Knapp sought leave to respond to my announcement that I intended to grant Defendants' motion for summary judgment in. *Nelson I*.[8]

Among other things, Ms. Knapp argued in her motion that my announcement of my decision regarding the motions for summary judgment submitted by the Commission and US Ecology "would deprive [the Boyd County Local Monitoring Committee] of the opportunity to defend the community's right to 'consent'. . . . " (*Id.*

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[8] Because the time for trial was fast approaching, I announced at oral argument that I would grant Defendants' motion for summary judgment in *Nelson I*, but the memorandum opinion and formal judgment would not be entered until sometime later. Ms. Knapp filed her motion for leave to appear as amicus curiae between the time of my announcement at oral argument and the date my memorandum opinion and judgment were issued.

¶ 13.) I denied Ms. Knapp's motion to appear as amicus curiae, (Filing 41 in *Nelson I.*), because the motion was not timely, because it sought to present evidence to the court without a petition for intervention, and because Ms. Knapp's evidence regarding the prior state-court litigation was not relevant to the question then before me.

From Ms. Knapp's involvement, it is *apparent as a matter of fact*, that Governor Nelson, the State of Nebraska, and Plaintiffs in this case were "closely related" at the time of *Nelson I.* Indeed, Ms. Knapp's concern when she sought to appear as amicus curiae was that my decision in *Nelson I* "would deprive [the Boyd County Local Monitoring Committee] of the opportunity to defend the community's right to 'consent'. . . . " Thus, not only did lead counsel in this case recognize that disposition of *Nelson I* would resolve the so-called "community consent" issue adversely to one of the present plaintiffs, but lead counsel took affirmative steps to assist the plaintiff in *Nelson I* in opposing the motions for summary judgment in that case. In turn, this somewhat exceptional factual circumstance suggests a coordinated litigation strategy between the plaintiff in *Nelson I* and *Nelson II* and the present Plaintiffs.

This case is very similar to *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), where prior litigation by the State of Washington was held to have bound its citizens in subsequent litigation. The State of Washington had opposed issuance of a Federal Power Commission dam license to the City of Tacoma. The state argued that its fishery resources would be harmed if the City of Tacoma were permitted to obtain a license and operate the dam. The State of Washington litigated first in an

administrative context and later in the United States Court of Appeals for the Ninth Circuit, but ultimately lost the case.

The City of Tacoma then brought an action against its own taxpayers for declaratory judgment of the validity of the bonds to finance the dam project. A state court enjoined the city from proceeding with the project because the court concluded that the City of Tacoma was not authorized to take or harm state property. The United States Supreme Court granted certiorari and reversed.

The Court held that the prior judgment "was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and like it, were bound by the judgment." *Id.* at 340-41.

Like the taxpayers of the City of Tacoma who were previously represented by the State of Washington, the public entities in this case (and their citizens) were represented by the State of Nebraska and Governor Nelson in *Nelson I* and *Nelson II*.

In summary, I conclude that the plaintiff in *Nelson I* and *Nelson II* and Plaintiffs in this case were and are "closely related" because: (1) the plaintiffs in all three actions (the Governor of the State of Nebraska or political subdivisions thereof) are political entities of the state, sharing common political bonds; (2) no private parties appear as named plaintiffs in *Nelson I*, *Nelson II* or in this case; (3) the plaintiff in *Nelson I* and *Nelson II* specifically asserted the interests of one of the Plaintiffs in this case (Boyd County, Nebraska) in bringing *Nelson I* and *Nelson*

II; and (4) lead counsel for Plaintiffs in this case appeared in an effort to oppose the granting of the motions for summary judgment in *Nelson I*, asserting that the decision in *Nelson I* would resolve the issue of "community consent" adversely to one of the Plaintiffs in this case (the Boyd County Local Monitoring Committee).

(2)

I turn next to the issue of whether the plaintiff in *Nelson I* and *Nelson II* and Plaintiffs in this case had identical or nearly identical interests. I conclude that their interests are identical, or nearly so, both legally and practically.

The United States Court of Appeals for the Tenth Circuit recently reiterated that "when a state litigates common public rights, the citizens of that state are represented in such litigation by the State and are bound by the judgment." *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (citing *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)).

In *Satsky* individual Colorado property owners brought an action against a mine owner seeking to recover damages arising from hazardous waste products produced by the mine. The State of Colorado had previously litigated a similar issue, and it had entered into a consent decree on the subject. The Court of Appeals was thus confronted with the question of whether res judicata should apply to bar the subsequent litigation.

The *Satsky* court wrote that "the extent to which plaintiffs are barred . . . turns on the nature of the rights asserted by them." *Id.* at 1470. On one hand, if "the claims are for injuries to interests which all citizens hold in common" and for which the state had already litigated, then the prior judgment would constitute a bar. *Id.* This would be so even though the plaintiffs in the *Satsky* litigation were private individuals because the prior litigation involved the assertion of public rights by the State of Colorado under the doctrine of *parens patriae* standing. *Id.* at 1469-70. On the other hand, if the *Satsky* litigation involved "injuries to purely private interests" which the state could not have raised in the prior litigation, then the claims were not barred. *Id.* at 1470.

Since the *Satsky* litigation involved claims by private individuals and the court of appeals was uncertain whether those individuals were asserting "purely private interests" or "injuries to interests which all citizens hold in common," the court remanded the case to the district court to determine which claims asserted by the plaintiffs were private and which were based on common public rights. *Id.*

The analysis suggested by the *Satsky* court is helpful here.[9] The *Satsky* court keyed on the question of whether

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[9] I pause here to note that unlike *Satsky* there is no need for additional fact finding on the issue of what interests or damages are truly being asserted by Plaintiffs in this case. Plaintiffs have been given a full and fair opportunity to present whatever facts they thought proper. As noted earlier, Plaintiffs have not claimed their are any material facts in dispute, and Plaintiffs have presented no evidence. *See* Fed. R. Civ. P. 56(e) ("[A]n

the prior and subsequent suits were "for injuries to interests which all citizens hold in common." *Id.* at 1470. If the prior and subsequent suits were for injuries which all citizens held in common, then the *Satsky* court believed that application of the doctrine of res judicata was appropriate. *Id.* I turn to that issue now.

In *Nelson I*, I found that Governor Nelson and the State of Nebraska had standing because that case was "one of the unusual cases where *parens patriae* standing exists." 834 F. Supp. at 1210. Liberally construing the amended complaint, I found that *parens patriae* standing existed because it was apparent to me that given the alleged lack of "community consent":

> . . . the State of Nebraska is alleging that the residents of Boyd County, Nebraska, and the State of Nebraska, as a member of the Compact, will be forced to accept low-level radioactive waste to the detriment of the health and welfare of residents of Boyd County, Nebraska, and the sovereignty of the State of Nebraska. . . .

Id.

The principal objectives of *Nelson I* and *Nelson II* were to preserve "the health and welfare of residents of Boyd County, Nebraska" and the concept of "community consent". These general health-and-welfare concerns of the residents of an entire county, coupled with the state-wide

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adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Specifically, there has been no evidence presented to suggest that Plaintiffs' claims in this case involve purely private claims.

concern for "community consent", first litigated in *Nelson I* and *Nelson II*, are clearly "injuries to interests which all citizens hold in common." *Satsky*, 7 F.3d at 1470.

Once again, *Nelson I* and *Nelson II* are like *City of Tacoma*. In *City of Tacoma*, the "common public rights" were the fishery resources of the State of Washington. In *Nelson I* and *Nelson II*. the common public right involved "community consent" and "the health and welfare of residents of Boyd County, Nebraska," occasioned by the threat of a radioactive waste facility.

Having determined that vindication of a common public right was sought in *Nelson I* and *Nelson II*, the question then becomes whether vindication of a similar public right is sought in this case. In this regard two things should be observed.

First, as previously indicated, the same nucleus of operative facts, i.e., "community consent," formed the factual predicate for *Nelson I* and *Nelson II* as well as the factual predicate for this case. The concept of "community consent", to the extent that it has any enforceable legal significance, is a right of the public negotiated and obtained by the State of Nebraska pursuant to its membership in the federally chartered Compact. *Nelson I*, 834 F.Supp. at 1208. "Community consent" simply has none of the attributes of "purely private interests", and to the extent it has legal relevance it is by definition a right claimed by the State of Nebraska *for all its citizens*.

Second, Plaintiffs do not seek to recover for injury to private rights, but for the injury to "the social fabric" of Boyd County, Nebraska. This is the same injury for which Governor Nelson sought relief in *Nelson I* and *Nelson II*.

Plaintiffs have adduced absolutely no evidence that they claim particularized damage to private individuals. Moreover, it is apparent from an examination of Plaintiffs' petition that the petition raises only the issue of communal damage.

For example, damage in this case includes "increased costs of law enforcement, increased costs for emergency response providers, and the costs of a grand jury investigation," (Filing 1 Attach. A ¶ 31), together with such other damage as "losses resulting from economic boycotts stimulated by this process," damage associated with "social conflicts and interpersonal animosities," damage to "social structures," damage associated with the "deterioration of the quality of life and social well-being of area residents," and damage associated with the disruption of the "social fabric of Boyd County." (*Id.* ¶ 50.)

The closest Plaintiffs come to particularizing a purely private claim of damage is in the allegation that "the members of the Boyd County Local Monitoring Committee have incurred expenses and have lost income due to the work required and the time involved in fulfilling their statutory obligation to monitor the Defendant's [US Ecology's] site selection process." (Filing 1 Attach. A ¶¶ 31, 50.) But even these damages are not pled as "purely private interests," but are pled in the context of the damage to the entire "social fabric of Boyd County, Nebraska."

While it is conceivable that under certain circumstances (none of which are present here) a "purely private interest" might be involved if a private individual were to pursue such a claim for expenses, when such a claim is

inextricably interwoven with communal damage to the "social fabric" of an entire county, such stray allegations should not be taken out of context to defeat application of the principle of res judicata, particularly where no private individual appears as a named party.[10] *See Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 99-101 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (applying doctrine of res judicata and holding that airlines were bound by prior litigation, even though they were not parties, as the City of Dallas represented the only legal interests the airlines possessed in the prior litigation) (Judge Wisdom wrote that a "party must show more than a special pecuniary interest when attempting to vindicate the breach of a public duty already litigated by a governmental agency. Permission to relitigate appears reserved for the private plaintiff who would vindicate a breach of duty owed specifically to the plaintiff. . . . "). *Id.* at 100.

In summary, I find that the interests of the plaintiff in *Nelson I* and *Nelson II* and the interests of Plaintiffs in this case are (and were) virtually identical because: (1) a significant part of the harm sought to be remedied in *Nelson I* and *Nelson II* was harm to the "health and welfare of residents of Boyd County, Nebraska," *Nelson I*, 834 F. Supp. at 1210, and the harm sought to be remedied in this case is essentially the same harm, injury to the

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[10] In this regard, I hasten to add that the court has not certified this case as a class action, and Plaintiffs have specifically asked me to defer consideration of the certification question until after resolution of the motion for summary judgment. (Filing 23.) Thus, concerns about inadvertent claim bars to private individuals by virtue of a class-action-certification order are not present in this case.

"social fabric of Boyd County, Nebraska;" and (2) any right to "community consent" asserted by Plaintiffs in this case was obtained by the State of Nebraska for all of its citizens as part of its participation in the federally chartered Compact, and thus interference with the right of "community consent" does not harm "purely private interests", but rather the "public interest" of all the citizens of Nebraska, and it is this public interest which Plaintiffs now assert that the plaintiff in *Nelson I* and *Nelson II* also sought to vindicate.

(3)

A number of additional observations regarding the issue of "privity" are appropriate.

First, there is no doubt that if Governor Nelson and the State of Nebraska had brought the causes of action articulated in this case, this court would have had jurisdiction. Although the jurisdictional predicate in *Nelson I* and *Nelson II* was this court's federal question jurisdiction, this court could have, and very likely would have, exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

Second, Plaintiffs in this case argue that because Governor Nelson and the State of Nebraska were found to have *parens patriae* standing in *Nelson I*, Governor Nelson could not have brought an action for damages. Plaintiffs are simply wrong on this point.

It is true that *parens patriae* standing would not permit an entity such as the State of Nebraska, or a person such as Governor Nelson, to bring an action for damages

where the essence of the cause of action is one of a breach of duty owed to *individuals* causing *purely personal damages* to those individuals. *See, e.g., People of the State of N.Y. by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (holding that the attorney general of the State of New York, suing as *parens patriae*, could not obtain a treble-damage RICO judgment for specific citizens and consumers of the State of New York). However, as the *Seneci* court recognized, a party having *parens patriae* standing could sue for damages that were separate from the interests of particular individuals. The Second Circuit specifically noted that if the attorney general had sued for "an injury to the general economy of the state, common law *parens patriae* standing would undoubtedly exist." *Id.* (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

The issue *not* before the court in *Seneci* is precisely the point in this case: Governor Nelson could have asserted the claim of damages now brought by Plaintiffs because the damages now sought by Plaintiffs are diffuse, generalized, "social-fabric" damages unrelated to the purely private interests of individuals. *Parens patriae* standing clearly existed in *Nelson I* for the governor to assert the type of damages now asserted by Plaintiffs in this case. Therefore, cases like *Seneci*, *see, e.g., State of Cal. v. Frito Lay, Inc.*, 474 F.2d 774, 776-77 (9th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), are not relevant since the complaint in those cases sought to recover monetary damages for injuries suffered by individuals.

III.

US Ecology has demonstrated with unusual clarity that: (1) a prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final decision on the merits; (3) the same cause of action involved in this case was involved in the prior case; and (4) the same parties, or those in privity, are involved in all cases.

Application of the doctrine of res judicata is particularly important in this case because a very important federal interest is at stake. Although perhaps not superficially apparent, what this case is really about is whether the state and its political subdivisions will be compelled to honor their obligations under a Compact which Congress approved pursuant to the Constitution. While the State of Nebraska and its constituent political bodies are entitled to fully and fairly litigate their legitimate claims, they are not entitled to wage what might be characterized as hit-and-run guerilla [sic] warfare by filing multiple lawsuits on the same claim in order to frustrate performance of the Compact.

In the words of Chief Judge Arnold of the United States Court of Appeals for the Eighth Circuit, the State of Nebraska and its constituent political bodies are entitled to "one fair chance." *Ruple*, 714 F.2d at 861. They have had that chance.

Accordingly,

IT IS ORDERED that the Motion for Summary Judgment (Filing 12) submitted by defendant US Ecology, Inc.,

is granted, and summary judgment shall be entered separately, providing that Plaintiffs shall take nothing because application of the doctrine of res judicata bars relitigation of their claims.

DATED this 21st day of July, 1994.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

Supreme Court, U.S.
FILED
JUN 20 1995
OFFICE OF THE CLERK

(2)

No. 94-1955

In The

Supreme Court of the United States

October Term, 1994

THE COUNTY OF BOYD, a local Nebraska political subdivision, and THE BOYD COUNTY LOCAL MONITORING COMMITTEE, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

US ECOLOGY, INC.,

Respondent.

On Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN G. SEGLIN, #13756*
MARTI J. BROCKMEIER, #20040
CROSBY, GUENZEL, DAVIS, KESSNER & KUESTER
Attorneys at Law
Suite 400
134 South 13th Street
Lincoln, Nebraska 68508
Telephone: (402) 434-7300
Attorneys for Respondent
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, US Ecology, Inc.[1], respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

[1] The parent corporation of US Ecology, Inc. is American Ecology, Inc. See, Supreme Court Rule 29.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 48 F.3d 359 (8th Cir. 1995). The opinion of the district court is reported at 858 F.Supp. 960 (D.Neb. 1994).

STATEMENT OF THE CASE

Petitioners' statement of the case inaccurately sets forth some of the facts underlying this action and omits others.

The district court found that it has diversity jurisdiction to decide this case. Pet. App. at 8. It therefore declined to decide whether the case could be entertained under federal question jurisdiction. *Id.* Conversely, the Eighth Circuit found that the case presents a federal question, and therefore declined to decide whether diversity jurisdiction exists. Pet. App. at 4. Contrary to the first question presented, the courts below correctly decided that the federal courts have jurisdiction to decide this case, either under the diversity of citizenship statute, or federal question statute.

As the district court's opinion discloses, there are no material facts in dispute in this case. Pet. App. at 21. The facts were determined by the district court to be uncontroverted. *Id.* Indeed, the petitioners conceded all of them to be true, *Id.*, including (a) that the Governor and the State of Nebraska, acted on behalf of Boyd County and the Boyd County Local Monitoring Committee in *Nelson I, as parens patriae;* (b) the claims raised in the action

are based on the same factual predicate and arise out of the same nucleus of operative facts as advanced in *Nelson I* and *Nelson II*; (c) essentially the same evidence as that offered in *Nelson I* and *Nelson II* governs the issue of fraud and negligence; and (d) Boyd County and the Boyd County Local Monitoring Committee are in privity with the plaintiffs in *Nelson I* and *Nelson II*. Pet. App. at 19-20.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No "Special And Important Reasons" Warranting Exercise of the Court's Certiorari Jurisdiction Exist.

As set forth in Supreme Court Rule 10.1, the Court grants petitions for certiorari "only when there are special and important reasons therefor." No such reasons are offered by the petition in this case.

Petitioners assert no split in the circuits on any question they present because there is none. Supreme Court Rule 10.1(a). Petitioners do not claim that the Court of Appeals has decided a federal question in a way that conflicts with an applicable decision of the Court. Supreme Court Rule 10.1(c). This case presents no important question of federal law which has not been, but should be settled by this Court. *Id.*

In reality, petitioners' claims boil down to complaints about the factual and legal determinations made by the lower courts. They seek to rehash issues which were fully presented to and decided by the lower courts. The Supreme Court ordinarily will deny certiorari when review is sought of a decision from a lower court which

turns solely upon an analysis of the particular facts. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925) (the Court stated: "[w]e do not grant a certiorari to review evidence and discuss specific facts."); *see also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (the Court ruled that it improvidently granted a cross-petition that presented primarily "a question of fact, which does not merit Court review."). The Supreme Court has also stated many times that it is not primarily concerned with the correction of errors in lower court decisions. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) "[t]his Court's review * * * is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." The grant of certiorari concept of importance has been held by the Court to focus on the significance of the matter to the public generally rather than the parties to the case particularly. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (the Court also provided that it does not sit "for the benefit of particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." (*id.* at 74)). Petitioners do not, nor could they in good faith, claim that the resolution of the issues they raise are of great consequence to the public at large; the issues here are important only to petitioners.

It is clear that petitioners seek a mere correction of perceived errors by the lower courts when they argue that their claims are factually and legally different from the claims presented in *Nelson I*. Pet. at 5-6. Nevertheless, petitioners attempt to bolster their petition by claiming

that the lower courts departed from "the accepted and usual course of judicial proceedings." Pet. at 7. This reference is apparently designed to invoke the Court's supervisory authority over the federal judicial system. *See* Supreme Court Rule 10.1(a).

Review of the Court's decisions shows that it exercises its supervisory authority only when truly important procedural or substantive issues are involved. For example, the administration of criminal justice in federal court (*McNabb v. United States*, 318 U.S. 332, 341 (1943)); the proper establishment of federal jury panels (*Theil v. Southern Pacific Co.*, 328 U.S. 217, 225 (1945)); the scope of the federal contempt powers (*Sacher v. United States*, 343 U.S. 1 (1952)); the construction of the federal rules of civil and criminal procedure (*Hickman v. Taylor*, 329 U.S. 495 (1947)); the use of abstention doctrines (*Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982)); and the power of a district court to deny removal from a state court because the district court's docket was too heavy (*Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976)) all justify exercise of the Court's supervisory authority. However, the supposed "irregularities" petitioners cite, i.e. district court's reliance on respondent's notice of removal (Pet. at 8); district court's recitation of the opposition of the Governor of Nebraska to construct the low-level radioactive waste facility (Pet. at 9); the district court's reliance on statements made by petitioners' counsel in a related case (Pet. at 10); and the district and Eighth Circuit courts' reliance on the litigational history of the waste facility (Pet. at 10), are in no realistic way irregular. But even if they were, they do not

rise to the level of important federal questions customarily considered by the Court when exercising its certiorari jurisdiction.

Petitioners argue that their fraud allegations are not the same cause of action as in *Nelson I* and *Nelson II*, and that they are not bound to those decisions because they were not parties to *Nelson I* and *Nelson II*. These are the same issues raised and decided by the district and Eighth Circuit courts. Pet. App. at 21-22; Pet. App. at 5. The district court found that the causes of action were identical for res judicata purposes.

> The issue brought by Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* was whether the Compact Commission and US Ecology had "failed to obtain 'community consent,' thereby violating a resolution passed and adopted by the Commission, and violating the Low-Level Radioactive Waste Disposal Act adopted by the State of Nebraska to implement the Compact." *Nelson I*, 834 F.Supp. at 1208. The "inextricably linked" first and second causes of action in this case, (Filing 1 Ex. A ¶33), are based upon US Ecology's alleged "efforts to site a low-level radioactive waste facility in a community without that community's consent." (*Id.* ¶50.

Pet. App. at 33-34.

The Eighth Circuit Court of Appeals upheld this ruling finding that "[t]he doctrine of claim preclusion provides that all theories of recovery stemming from one factual situation must be brought at once, or are forfeited; the law will not tolerate successive suits by a plaintiff stemming from the same scenario." Pet. App. at 5-6.

Similarly, the district court found that there was "privity" between the petitioners and the Governor of the State of Nebraska because they " 'are so closely related' to Governor Nelson and the State of Nebraska in *Nelson I* and *Nelson II* and 'their interests so nearly identical' that it 'is fair to treat them as the same parties for the purposes of determining the preclusive effect' of *Nelson I* and *Nelson II* on the present action." Pet. App. at 36. The reasons given by the district court for this close relationship are as follows:

> (1) the plaintiffs in all three actions (the Governor of the State of Nebraska or political subdivisions thereof) are political entities of the state, sharing common political bonds;
>
> (2) no private parties appear as named plaintiffs in *Nelson I, Nelson II* or in this case;
>
> (3) the plaintiff in *Nelson I* and *Nelson II* specifically asserted the interests of one of the Plaintiffs in this case (Boyd County, Nebraska) in bringing *Nelson I* and *Nelson II*; and
>
> (4) lead counsel for Plaintiffs in this case appeared in an effort to oppose the granting of the motions for summary judgment in *Nelson I*, asserting that the decision in *Nelson I* would resolve the issue of "community consent" adversely to one of the Plaintiffs in this case (the Boyd County Local Monitoring Committee).

Pet. App. at 40-41.

The Eighth Circuit upheld the decision of the district court stating:

> Here, the district court, in its comprehensive, thorough opinion, held that the interests of the

> plaintiffs in the *Nelson* cases and the County herein were identical. *County of Boyd*, 858 F.Supp. at 971-73.
>
> No other conclusion is possible. In the *Nelson* cases, the County's residents were represented by the state and the governor of Nebraska; in the present action, they are represented by the County, which seeks identical relief. [The County as used by the Eighth Circuit includes both Boyd County and the Boyd County Local Monitoring Committee].

Pet. App. at 6.

The claim of irregularity by the district court for considering counsel's litigation strategy (Pet. at 9-10) is not only mischaracterized by petitioners but answered in great detail in the court's decision. Pet. App. 37-39. The district court concluded by stating: "[f]rom Ms. Knapp's involvement it is *apparent as a matter of fact*, that Governor Nelson, the State of Nebraska and Plaintiffs in this case were 'closely related' at the time of *Nelson I*." Pet. App. 39.

Petitioners claim that the recitation of the litigational history of attempts to stop the construction of the low-level radioactive waste facility shows prejudice on the part of the district and Eighth Circuit courts because petitioners were not parties to the prior litigation and the case at bar does not seek to stop the construction of the facility. Pet. at 6, 10-11. The lower court's summary of prior litigation dealing with the same basic subject matter (Pet. App. at 22; Pet. App. at 2) is in no way unusual. Courts commonly recite historical facts in related cases and compare issues which may provide some insight in

analyzing the claims presented to them for decision. Nothing in that approach deprived the petitioners of any legal rights; more to the point, nothing in that approach departs so far from common adjudicative methodology to warrant this Court's attention.

Petitioners also complain that the district court's reliance on US Ecology's notice of removal and an exhibit attached thereto was a departure from the common understanding of the rules of evidence and constituted a ruling on the law unsupported by any precedent. Pet. at 7-8. This claim, however, misstates the district court's rationale for relying on US Ecology notice of removal and attached exhibit. The district court fully addressed petitioners' argument and supported its decision with complete and appropriate references to the facts and the law. *See* Pet. App. at 14-15.

Petitioners renewed this complaint before the Eighth Circuit, which specifically rejected it, apparently relying on the district court's analysis. Pet. App. at 4, n.3. Ironically, given their present complaints about "irregularities," petitioners also attempt to bolster their jurisdictional argument by raising new issues on appeal which were never presented to the district court, and by relying on a document never offered in evidence. Pet. App. at 4. The Eighth Circuit declined to resolve petitioners' arguments about diversity jurisdiction however, finding that "this case is within our subject matter jurisdiction because it presents a federal question." *Id.* It offered clear and persuasive reasons for that conclusion. *Id.* In addition, the petition does not quarrel with those reasons,

nor does it directly challenge the Eighth Circuit's jurisdictional ruling.

CONCLUSION

No special and important reasons warranting exercise of this Court's certiorari jurisdiction exist. Petitioners present no such "special and important reasons," but merely seek a review by this Court of the factual and legal determinations of the lower courts because of their dissatisfaction with the adverse decisions. The district court and Eighth Circuit correctly decided the issues of res judicata and removal jurisdiction. The claimed departure from the accepted and usual course of judicial proceedings is without merit. The petition for a writ of certiorari should be denied.

Respectfully submitted,

US Ecology, Inc., Respondent,

By: Steven G. Seglin
Marti J. Brockmeier
Crosby, Guenzel, Davis,
Kessner & Kuester
134 S. 13th Street, Suite 400
Lincoln, Nebraska 68508
Telephone (402) 434-7300